A

LIM EYE THUN

v.

MAJLIS PEGUAM MALAYSIA & ANOR

B

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
ABDUL MALIK ISHAK JCA
WAN ADNAN MUHAMAD JCA
[CIVIL APPEAL NO: W-02-1314-2005]

C

3 DECEMBER 2009

CIVIL PROCEDURE: *Judgments and orders - Declarations - No benefit in declaration sought - Application by plaintiff for declaration that termination of employment was invalid - Plaintiff's representation to*

D

Industrial Court for re-instatement amounted to acknowledgement of termination by employer - Question of whether inquiry and suspension of employment was valid rendered academic - Declaration sought rendered academic - Application dismissed

E

LEGAL PROFESSION: *Malaysian Bar - Bar Council - Employees - Termination of employment - Plaintiff appointed by Bar Council as director of complaints attached to Disciplinary Board - Plaintiff's employment terminated after domestic inquiry for misconduct - Whether plaintiff's termination validly effected under s. 98(3) Legal Profession Act 1976*

F

The plaintiff was appointed by the first defendant as director of complaints and was attached to the second defendant. The defendants, *vide* a letter signed by the President of the first defendant and the Chairman of the second defendant, notified the

G

plaintiff that the first defendant in conjunction with the second defendant decided to constitute a domestic inquiry ("the inquiry") against the plaintiff in relation to six charges of misconduct. Due notice of inquiry was issued to the plaintiff. The plaintiff however failed to attend the inquiry. The inquiry proceeded as scheduled

H

and found the plaintiff guilty of all the charges. The first defendant then notified the plaintiff of the finding of the inquiry and that the plaintiff's employment was terminated with immediate effect. The plaintiff commenced the originating summons seeking a declaration that the inquiry and the orders made by the defendants against

I

the plaintiff were null and void. The plaintiff's action was dismissed by the High Court and hence this appeal. The plaintiff claimed that the first defendant was the employer of the plaintiff and so

under s. 98(3) of the Legal Profession Act 1976 ('the Act'), only the first defendant had the right to terminate the plaintiff's employment. The question which arose for determination was whether the first defendant's termination of the plaintiff's employment was validly effected pursuant to s. 98(3) of the Act.

Held (dismissing the appeal with costs)
Per Low Hop Bing JCA:

(1) The plaintiff as director of complaints was also the secretary to the second defendant under s. 93(5) and s. 98(2) of the Act. The plaintiff was nonetheless a full-time employee of the first defendant. The first defendant was vested with the power to appoint the plaintiff as director of complaints. This power to appoint carried with it the power to revoke the appointment. The "hands-on" participation by the first defendant in suspending the plaintiff from work was in line with the powers of the first defendant as an employer. (paras 21 & 22)

(2) The constituting of the inquiry was neither prohibited nor required under the provisions of the Legal Profession Act 1976 generally and s. 98(3) specifically. The inquiry did not contravene s. 98(3) or the plaintiff's contract of employment. The inquiry had not been given the power to revoke the plaintiff's appointment. That power was expressly conferred upon the first defendant. The first defendant had not delegated, to the inquiry, the power of revoking the plaintiff's appointment. Having received the finding of the inquiry, the first defendant decided in accordance with its power to revoke the plaintiff's appointment pursuant to s. 98(3). Thus, the question posed was answered in the affirmative. (para 23)

Per Abdul Malik Ishak JCA:

(1) The plaintiff carried out the functions for the second defendant and so, it would be reasonable to say that the second defendant respondent ought to be involved in conducting the inquiry. The six charges related to the plaintiff's functions and responsibilities as director of the complaints secretariat. (para 55)

(2) Any objection pertaining to the issue of the threshold jurisdiction during the domestic investigation by the inquiry should be raised there. The plaintiff and her counsel however chose not to attend the inquiry. (para 58)

(3) The representation to the Industrial Court by the plaintiff the issue of re-instatement under s. 20(1) of the Industrial Relations Act 1967 reflected to a large extent the acceptance by the plaintiff that the first defendant had terminated her services. Consequently, the question of whether the inquiry and the suspension of her employment was valid or otherwise had become an academic issue. The issues that were raised and the reliefs that were prayed for by the plaintiff had become academic. The plaintiff's services had been terminated and so there was no longer any lawful recipient of any benefit of any declaration sought in the originating summons.
(paras 61, 63, 66 & 67)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif telah dilantik oleh defendan pertama sebagai pengarah bahagian aduan dan ditempatkan bersama defendan kedua. Defendan-defendan, melalui surat yang telah ditandatangani oleh Presiden defendan pertama dan Pengerusi defendan kedua, memberitahu plaintif bahawa defendan pertama, bersama dengan defendan kedua, telah membuat keputusan untuk menjalankan siasatan dalaman ('siasatan') terhadap plaintif berhubung enam pertuduhan salahlaku. Notis siasatan telah dikeluarkan kepada plaintif. Tetapi plaintif gagal hadir siasatan tersebut. Siasatan diteruskan seperti mana dirancangkan dan mendapati plaintif bersalah atas kesemua pertuduhan salahlaku. Defendan pertama memberitahu plaintif mengenai keputusan siasatan tersebut dan pekerjaan plaintif telah ditamatkan. Plaintif memulakan saman pemula untuk deklarasi bahawa siasatan tersebut dan perintah-perintah yang dibuat oleh defendan-defendan terhadap plaintif tak sah dan batal. Tindakan plaintif ditolak oleh Mahkamah Tinggi, oleh yang demikian, rayuan ini. Plaintif membuat tuntutan bahawa defendan pertama adalah majikan plaintif dan bawah s. 98(3) Akta Profesion Undang-Undang 1976 ('Akta'), hanya defendan pertama mempunyai hak untuk membatalkan pekerjaan plaintif. Soalan yang timbul untuk diputuskan adalah sama ada pembatalan pekerjaan plaintif oleh defendan pertama dilaksanakan dengan sah mengikut s. 98(3) Akta tersebut.

Diputuskan (menolak rayuan dengan kos)
Oleh Low Hop Bing HMR:

(1) Plaintif sebagai pengarah bahagian aduan adalah juga setiausaha kepada defendan kedua di bawah s. 93(5) dan s. 98(2) Akta. Plaintif antara lain adalah pekerja sepenuh masa

kepada defendan pertama. Defendan pertama mempunyai kuasa untuk melantik plaintif sebagai pengarah bahagian aduan. Kuasa untuk melantik ini juga membawa kuasa yang boleh membatalkan perlantikan tersebut. Penglibatan defendan pertama dalam menggantung plaintif dari kerja adalah selaras dengan kuasa defendan pertama sebagai majikan.

(2) Pembentukan siasatan tidak dilarang atau diperlukan di bawah peruntukan Akta Profesion Undang-Undang 1976 secara amnya dan s. 98(3) terutamanya. Siasatan tidak melanggar s. 98(3) atau kontrak pekerjaan plaintif. Siasatan tidak diberikan kuasa untuk membatalkan pekerjaan plaintif. Kuasa itu hanyalah diberikan kepada defendan pertama. Defendan pertama tidak memberi tugas kepada siasatan kuasa pembatalan perlantikan plaintif. Setelah menerima keputusan siasatan, defendan pertama telah, mengikut kuasa yang telah diberikan kepadanya, membatalkan pekerjaan plaintif di bawah s. 98(3). Oleh itu, soalan yang timbul telah dijawab secara afirmatif.

Oleh Abdul Malik Ishak HMR:

(1) Plaintif telah melaksanakan fungsi-fungsi untuk defendan kedua, oleh itu ia adalah munasabah untuk mengatakan bahawa defendan kedua sepatutnya terlibat dalam menjalankan siasatan. Keenam-enam pertuduhan berhubung fungsi-fungsi dan tanggungjawab plaintif sebagai pengarah bahagian aduan secretariat.

(2) Setiap bantahan mengenai isu bidangkuasa puncak semasa penyiasatan dalaman oleh bahagian siasatan sepatutnya dibangkitkan di sana. Plaintif dan anakguam walau bagaimanapun tidak hadir siasatan tersebut.

(3) Representasi yang telah dibuat kepada Mahkamah Perusahaan oleh plaintif mengenai isu dikembalikan semula di bawah s. 20(1) Akta Perhubungan Perusahaan 1967 memberi gambaran bahawa plaintif telah menerima kenyataan yang defendan pertama telah membatalkan perkhidmatannya. Oleh yang demikian, soalan sama ada siasatan dan penggantungan pekerjaan plaintif adalah sah atau tidak telah menjadi isu akademik. Isu-isu yang telah dibangkitkan dan relief-relief yang telah dipohon oleh plaintif telah menjadi akademik. Perkhidmatan plaintif telah dibatalkan dan oleh itu tiada sesiapa yang boleh memperolehi faedah deklarasi yang dituntut di dalam saman pemula.

Case(s) referred to:

Barnard And Others v. National Dock Labour Board And Another [1953] 1 All ER 1113 ***(refd)***

Cheah Foong Chiew v. Lembaga Jurutera Malaysia [1999] 3 CLJ 242 CA ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(refd)***

Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor [1978] 1 LNS 44 FC ***(refd)***

Holiday Inn Kuching v. Elizabeth Lee Chai Siok [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 HC ***(refd)***

Laws v. London Chronicle (Indicator Nespapers), Ltd [1959] 2 All ER 285 ***(refd)***

London Transport Executive v. Clarke [1981] ICR 355 ***(refd)***

Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh Ram Singh [1992] 1 CLJ 36; [1992] 1 CLJ (Rep) 212 SC ***(refd)***

Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 FC ***(refd)***

Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd [2006] 3 CLJ 837 FC ***(refd)***

Norwest Holst Ltd v. Department of Trade and Others [1978] 3 All ER 280 ***(refd)***

Siti Sarinah Sibun v. Azizah Kamaruddin & Anor [2009] 1 LNS 725 HC ***(refd)***

SR Tewari v. District Board AIR [1964] SC 1680 ***(refd)***

The Borneo Post Sdn Bhd v. Margaret Wong [2001] 8 CLJ 758 HC ***(refd)***

Union of India and Another v. WN Chadha AIR [1993] SC 1082 ***(refd)***

Vine v. National Dock Labour Board [1957] AC 488 HL ***(refd)***

Wiseman And Another v. Borneman And Others [1969] 3 All ER 275 ***(refd)***

Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

Legislation referred to:

Industrial Relations Act 1967, s. 20(1)
Interpretation Acts 1948 and 1967, s. 47
Legal Profession Act 1976, ss. 93(1), (5), 98(1), (2), (3)
Rules of the High Court 1980, O. 15 r. 16
Specific Relief Act 1950, s. 14

Other source(s) referred to:

OP Malhotra, *The Law of Industrial Disputes*, 5th edn, vol 2, p 905

For the plaintiff/appellant - Zainur Zakaria (Puspawati Rosman with him); M/s Onn & Partners

For the 1st & 2nd defendant - Sivabalah (E Reena with him); M/s Shearn Delamore & Co

[Appeal from High Court; Originating Summons No: R1-24-63-05]

Reported by Amutha Suppayah

JUDGMENT

Low Hop Bing JCA:

Appeal

[1] On 27 September 2005, the Kuala Lumpur High Court dismissed with costs the appellant's ("the plaintiff's") originating summons. This is the plaintiff's appeal against that decision.

Factual Background

[2] The factual background is substantially uncontroverted.

[3] The plaintiff was appointed by the Bar Council ("the first defendant") *vide* letter dated 11 September 2001 as director of complaints and was attached to the advocates and solicitors disciplinary board ("the second defendant"). Para 10 of the letter states, *inter alia*, that "the Bar Council reserves the right to terminate your services summarily in cases of misconduct."

[4] The first and second defendants, *vide* letter dated 20 Jun 2005, signed by the president of the first defendant and the chairman of the second defendant, notified the plaintiff that the first defendant in conjunction with the second defendant decided to constitute a domestic inquiry ("the inquiry") against the plaintiff in relation to six charges of misconduct *viz*:

> Charge No. 1
>
> Gross negligence and dereliction of duty in respect of Complaint No. DB/04/0194 (Re: Jacy Lau Aik Fong) wherein an erroneous Order dated 31 March 2005, which was prepared by you and/or under your supervision, suspending an 'advocate and solicitor', was issued and sent out from the Disciplinary Board on the same day under a cover letter signed by you.
>
> Charge No. 2
>
> Gross negligence and dereliction of duty in respect of Complaint No. DC/04/0158 (Re: Abdul Malik bin Mat Judi) wherein an erroneous Order dated 31 March 2005, which was prepared by you and/or under your supervision, suspending the said Advocate and Solicitor was issued and sent out from the Disciplinary Board on the same day under a cover letter signed by you.

A Charge No. 3

Indifferent attendance at work and absent at all board meetings since 26 April 2005 on the basis of your proposed resignation duly recorded by the Board but subsequently purporting to resume full duties as Director since 13 June 2005 without any
B reference or explanation.

Charge No. 4

Insubordination in purporting to take disciplinary action against a staff of the Disciplinary Board, without reference to the Chairman
C of the Disciplinary Board, by issuing two memoranda dated 14 June 2005 to the Senior Legal Officer Ms Tomis Peter Samat knowing that the matters complained of therein were undertaken on the instruction of the Chairman of the Disciplinary Board.

Charge No. 5

D Insubordination in relation to relocation of staff working place that had previously been decided upon by the Chairman of the Disciplinary Board and the AFSC.

Charge No. 6

E Insubordination in seeking a return of files that the Chairman of the Disciplinary Board had directed be kept under lock and key, thereby knowingly countermanding the directions of the Chairman.

[5] On 19 July 2005, a notice of inquiry, signed by the chairman
F thereof, was issued to the plaintiff, informing the plaintiff of the hearing date ie, 27 July 2005 at 10am in room 3 of the premises of the second defendant, in relation to the aforesaid six charges. The letter also stated that "in the event that you absent yourself, the inquiry reserves the right to proceed as scheduled and arrive
G at a decision thereat." Copies of the notice were extended to the president of the first defendant and the chairman of the second defendant.

[6] Pending the inquiry, the first and the second defendants suspended the plaintiff from work with immediate effect.

H

[7] *Vide* letter dated 20 July 2005, the chairman of the inquiry notified the plaintiff that the hearing of the inquiry would be held, at the same place as previously stated, at 4pm on 27 July 2005 and not at 10am as stated in the letter dated 19 July 2005, and
I that if the plaintiff failed to attend, the inquiry "reserves the right

to proceed as scheduled and arrive at a decision thereat." Copies thereof were also extended to the president of the first defendant and the chairman of the second defendant.

[8] On 27 July 2005, the plaintiff made an application for postponement on the ground that the plaintiff needed more time to prepare the defence. Hearing was postponed to 15 and 16 August 2005.

[9] On 1 August 2005, plaintiff's solicitors wrote to the second defendant, challenging the jurisdiction of the second defendant to conduct the inquiry and calling for it to be discontinued, in addition to the withdrawal of the plaintiff's suspension.

[10] *Vide* letter dated 3 August 2005, the solicitors for the first and the second defendants responded that the defendants could not accede to the plaintiff's request. The defendants' solicitors added that the inquiry "is being carried out by the disciplinary board in conjunction with the Bar Council."

[11] On 15 August 2005 ie the first day of the inquiry, the plaintiff was absent. In the circumstances, the inquiry proceeded as scheduled and found the plaintiff guilty of all the charges.

[12] *Vide* "notice of termination of employment" dated 22 August 2005, the first defendant notified the plaintiff of the finding of the inquiry, and informed the first defendant that "due to the seriousness of the misconduct, your employment is hereby terminated with immediate effect."

[13] Consequently, the plaintiff commenced the originating summons, which sought a declaration that the inquiry conducted and the orders made by the defendants against the plaintiff were null and void. The plaintiff's originating summons was dismissed by the High Court.

[14] Hence, the instant appeal by the plaintiff.

Disciplinary Powers

[15] Learned counsel Mr Zainur Zakaria (assisted by Ms Puspawati Rosman) submitted for the plaintiff that the first defendant was the employer of the plaintiff and so under s. 98(3) of the Legal Profession Act 1976 ("s. 98(3)"), only the first defendant has the right to terminate the employment of the plaintiff qua employee. Support was sought in *SR Tewari v. District*

Board AIR [1964] SC 1680; and *Vine v. National Dock Labour Board* [1957] AC 488 HL. (A reference hereinafter to a section is a reference to that section in the Legal Profession Act 1976).

[16] Defendants' learned counsel, Mr N. Sivabalah (Ms E. Reena with him), took the position that the termination of the employee's contract of employment was carried out by the first defendant pursuant to s. 98(3). They stressed that there is no legal obligation on the part of the first defendant to set up the inquiry, referring to *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344 FC; and *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449 FC.

[17] The learned High Court judge agreed with the submission presented for the defendants and upheld the termination of the plaintiff's employment.

[18] We are of the view that the question that arises for determination in the instant appeal may be formulated as follows:

> On the basis of the aforesaid factual background, was the first defendant's termination of the plaintiff's employment or revocation of the plaintiff's appointment as director of complaints validly effected pursuant to s. 98(3)?

[19] Section 98 which regulates, *inter alia*, the appointment of the plaintiff and the revocation thereof merits reproduction as follows:

> 98. Director of the Complaints Secretariat
>
> (1) The Bar Council shall, from time to time as may be required, appoint an advocate and solicitor of not less than five years standing to the office of the Director of the Complaints Secretariat.
>
> (2) The Director shall serve as the Secretary to the Disciplinary Board, the Disciplinary Committee and the Investigating Tribunal.
>
> (3) The Bar Council shall be responsible for the remuneration of the Director and shall have the power to revoke his appointment.
>
> (4) The Director shall be responsible for the daily administration of complaints against advocates and solicitors under this Part.

[20] In the instant appeal, the first and the second defendants have conjunctively taken the "trinity of actions" *viz*:

(1) Suspension of the plaintiff from work as director of complaints;

(2) Constituting the inquiry; and

(3) Revocation of the plaintiff's appointment.

[21] The first and the second defendants' suspension of the plaintiff from work as director of complaints illustrates the singularly significant "hands-on" participation by the first defendant. Although the second defendant has been established pursuant to s. 93(1), and, the plaintiff as director of complaints is also the secretary to the second defendant under s. 93(5) and s. 98(2), the plaintiff is nonetheless a full-time employee of the first defendant. The first defendant is vested with the power to appoint the plaintiff as director of complaints: s. 98(1). This power to appoint carries with it the power to revoke the appointment: See *S.R. Tewari*, *supra*, where the Allahabad Supreme Court held that the power to appoint ordinarily carries with it the power to terminate appointment, and a power to terminate may, in the absence of restrictions express or implied, be exercised subject to the conditions prescribed in that behalf by the authority competent to appoint. In Malaysia, this principle is given statutory expression in s. 47 of the Interpretation Acts 1948 and 1967 in the following words:

> Power to appoint includes power to remove, etc.
>
> 47. Where a power to make an appointment is conferred by any written law, the appointing authority shall also have power (subject to any limitations or qualifications which affect the power of appointment) to remove, suspend, reappoint or re-instate any person appointed in the exercise of the power.

[22] The "hands-on" participation by the first defendant in suspending the plaintiff from work is in line with the powers of the first defendant as an employer.

[23] Next, the constituting of the inquiry is neither prohibited nor required under the provisions of the Legal Profession Act 1976 generally and s. 98(3) specifically. Apparently, in industrial law, high authorities have shown that the constituting of the inquiry is not a strict legal requirement: see *Wong Yuen Hock*, *supra* FC; and *Milan Auto Sdn Bhd*, *supra* FC. Be that as it may, the first and

A the second defendants had gone the extra mile to do so in order to give the plaintiff every opportunity to answer the six charges preferred against her in line with the fundamental rules of natural justice. The inquiry has been entrusted with the specific responsibility only to investigate the basis, if any, of the charges. B The chairman of the inquiry, a retired judge of our High Court, has enhanced the elements of integrity, independence and impartiality. In the absence of any express or implied prohibition in the constituting of the inquiry, we are unable to see how the inquiry could have contravened s. 98(3) or the plaintiff's contract C of employment. The inquiry had not been given the power to revoke the plaintiff's appointment. That power is expressly conferred upon the first defendant. The first defendant has not delegated, to the inquiry, the power of revoking the plaintiff's appointment. Having received the finding of the inquiry, the first D defendant has made a decision in accordance with its power to revoke the plaintiff's appointment pursuant to s. 98(3).

[24] We now proceed to consider *Vine*, *supra*, which was cited for the plaintiff. There a dock labourer was employed in the E reserve pool by the defendants, the National Dock Labour Board, under the scheme set up by the Dock Workers (Regulation of Employment) Order 1947. The labourer was allocated work with a stevedoring company but failed to report to them. A complaint lodged with the defendants was heard by a disciplinary committee F appointed by the local dock labour board, who upheld the complaint and, purporting to act under cl. 16(2)(c) of the Order, gave the plaintiff notice to terminate his employment with the defendants. His appeal to a tribunal set up under the scheme was dismissed. He started proceedings against the defendants claiming G damages for wrongful dismissal and a declaration that his purported dismissal was illegal, ultra vires and void. Ormerod J. awarded him damages and granted a declaration. The Court of Appeal held that damages were a sufficient remedy and that a declaration should not be granted. On appeal to the House of Lords, it was held H that the plaintiff's dismissal was invalid, since the local dock labour board had no power under the scheme to delegate their disciplinary powers to a disciplinary committee.

[25] We find that the facts in *Vine*, *supra*, are clearly I distinguishable from those in the instant appeal. There, the employing authority was the National Dock Labour Board. However, the disciplinary committee was not appointed by the National Board, but by the local board. The notice to terminate

the employment was also given by the local board. The local board had no power to delegate disciplinary powers to a disciplinary committee. By contrast, in the instant appeal, the first defendant is an active "hands-on" participant in the "trinity of actions". The notice of termination of the plaintiff's employment was issued by the first defendant. Hence, *Vine*, *supra*, is not supportive of the plaintiff's submission herein.

[26] In the instant appeal, there is no question of a stranger or the inquiry usurping the powers of the first defendant in revoking the plaintiff's appointment under s. 98(3). The power to revoke the plaintiff's appointment has never been exercised by any other person. It was exercised by the first defendant, as clearly manifested when the first defendant issued the letter of termination of the plaintiff's employment dated 22 August 2005. The first defendant has clearly exercised the powers pursuant to s. 98(3). These steps and actions taken by the first defendant were validly effected under s. 98(3).

Conclusion

[27] On the foregoing grounds, we hold that the plaintiff has failed to show any merit in this appeal. We answer the above question in the affirmative. The learned judge's decision is affirmed. This appeal is dismissed with costs of RM5,000 to the first defendant. Deposit to the first defendant on account of the said costs.

[28] My learned brother Abdul Malik Ishak JCA has also prepared his judgment in support of mine.

Abdul Malik Ishak JCA:

[29] The plaintiff appellant was appointed by the first defendant respondent (Majlis Peguam Malaysia) as a director of the complaints secretariat pursuant to s. 98(1) of the Legal Profession Act 1976 (Act 166). While the second defendant respondent (Lembaga Tatatertib Peguam-Peguam) is a body established under the said Act.

[30] The duties of the plaintiff appellant included the administration of the complaints secretariat, organisation of members for appointment to the various panels of the investigating tribunals and disciplinary committees, co-ordinating sittings of these panels, arranging for brief summaries of decisions made against advocates and solicitors and forwarding them to the Bar Council

from time to time and such other duties as may be necessary in order to ensure the efficient working of the disciplinary system under the Legal Profession Act 1976 (Act 166).

[31] It was emphasised that the plaintiff appellant was, at all material times, an employee of the first defendant respondent pursuant to a letter of appointment dated 11 September 2001 as seen at pp. 65 to 67 of the record of appeal.

[32] On 20 June 2005, the second defendant respondent issued a letter to the plaintiff appellant suspending her for misconduct. The decision to suspend the plaintiff appellant was taken jointly by both the first and the second defendants respondents. On the same day, the second defendant respondent in conjunction with the first defendant respondent issued to the plaintiff appellant a notice of domestic inquiry notifying the plaintiff appellant that both the defendants respondents have decided to constitute a domestic inquiry into the allegations of misconduct against the plaintiff appellant.

[33] By letters dated 19 July 2005 and 20 July 2005, the second defendant respondent notified the plaintiff appellant that a domestic inquiry into the alleged charges of misconduct against the plaintiff appellant will be conducted on 27 July 2005.

[34] On 1 August 2005, the solicitors for the plaintiff appellant wrote to the second defendant respondent intimating that the latter was not the employer of the plaintiff appellant and, consequently, had no right in law to suspend the plaintiff appellant and to institute any disciplinary proceedings against the plaintiff appellant. The second defendant respondent rejected outright the plaintiff appellant's request for the domestic inquiry to be discontinued and the suspension withdrawn.

[35] In submitting that there was an employer employee relationship between the plaintiff appellant and the first defendant respondent, it was emphasised that the plaintiff appellant's salary was paid by the first defendant respondent and the latter also contributed to the plaintiff appellant's EPF and SOCSO. And the first defendant respondent also agreed that at its discretion, bonus will be paid to the plaintiff appellant in accordance with the letter of appointment.

[36] The letter of appointment contains a clause on termination. It reads as follows:

Termination Notice

During the period of probation, either party can give the other twenty-four (24) hours notice in writing without assigning any reasons, but upon confirmation either party can terminate the employment by giving the other one (1) month notice in writing without assigning any reasons but the Bar Council reserves the right to terminate your services summarily in cases of 'misconduct'.

[37] On 9 August 2005, the plaintiff appellant filed an application by way of an originating summons in the High Court seeking for the following reliefs:

(i) a declaration that the on-going domestic inquiry against the plaintiff appellant is null and void;

(ii) a declaration that the order suspending the plaintiff appellant made on 20.6.2005 is null and void;

(iii) costs;

(iv) further or other relief as may be deemed necessary by the Honourable Court.

[38] Motivated by the filing of the originating summons in the High Court, the plaintiff appellant through her solicitors wrote, on 15 August 2005, a letter to the solicitors of the second defendant respondent stating that since the plaintiff appellant has filed the originating summons, the plaintiff appellant will not be attending the domestic inquiry scheduled on 15 August 2005 and on 16 August 2005.

[39] On 16 August 2005, the domestic inquiry found the plaintiff appellant guilty of all the six charges made against her. And on 22 August 2005, the first defendant respondent terminated the plaintiff appellant's appointment with immediate effect.

[40] On 27 September 2005, the learned judge of the High Court dismissed the plaintiff appellant's originating summons forthwith. Aggrieved by that decision, the plaintiff appellant appealed to this court.

[41] Six charges of misconduct were laid before the plaintiff appellant and they have been set out by my learned brother Low Hop Bing, JCA in his well written judgment. This is my supporting judgment to the impeccable judgment of my learned brother Low Hop Bing, JCA and I agree fully with his Lordship's judgment without any reservation.

[42] I had occasion to say something about misconduct when I was sitting on the High Court bench in the case of *Siti Sarinah Sibun v. Azizah Kamaruddin & Anor* [2009] 1 LNS 725 HC. This was what I said:

> [36] The Industrial Court defined 'misconduct' in *Plaat Rubber Sdn Bhd v. Goh Chok Guan* [1995] 1 ILR 79 in this way:
>
> > Misconduct means such act or conduct as adversely affects employees duties towards the employer. The misconduct complained of must have the same relations with the employees duties or the work entrusted to him by the employer or his competency to perform the same. Any breach of an express or implied duty on the part of the employee, unless it be of a trifling nature, would amount to misconduct.
>
> [37] And the burden of proving misconduct justifying dismissal lies with the employer and it would be based on the balance of probabilities (*Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 3 CLJ 314, CA). According to Lord James of Hereford in *Clouston & Co, Ltd v. Corry* [1906] AC 122, PC at 129:
>
> > There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal'.

[43] Every employee has an obligation to faithfully discharge his duty to his employer. Where an employee commits gross misconduct, the employer is justified in dismissing the employee after giving the employee an adequate opportunity to refute the charges framed against the employee. Here, the domestic inquiry was the avenue for the plaintiff appellant to refute all the six charges laid against her.

[44] Not all misconduct warrants dismissal. In determining whether an employee's misconduct warrants dismissal from employment, an appraisal of all the facts and circumstances of each individual case must be undertaken.

[45] An employee is expected to obey the lawful and reasonable orders of the employer. The 6th charge against the plaintiff appellant makes reference to insubordination by countermanding the directions of the Chairman. That was a serious charge. The failure to obey the lawful and reasonable orders of the Chairman will certainly be a material breach of the letter of appointment. Lord Evershed MR in *Laws v. London Chronicle (Indicator Nespapers), Ltd.* [1959] 2 All ER 285, 287, CA had this to say about wilful disobedience:

> ... wilful disobedience of a lawful and reasonable order shows a disregard - a complete disregard - of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally.

[46] Siti Norma Yaakob FCJ (later Chief Judge of Malaya) in *Ngeow Voon Yean v. Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd* [2006] 3 CLJ 837 FC, spoke of the fundamental implied duty of an employee in relation to his employer. This was what her Ladyship said at p. 850 of the report:

> [29] Working as instructed is the employee's basic consideration under a contract of employment just as providing remuneration is the basic consideration of his employer. However the employee's duty to comply is confined to all the lawful and reasonable orders of his employer in respect of the performance of such functions that falls within the scope of his contract of employment. Whether the employer's orders are lawful and reasonable would depend very much on the terms and conditions of the contract and the character of employment. The term 'lawful and reasonable order' is often used to describe the order given and in this context it means primarily an order which is reasonably within the ambit of the employment in question so that, in any given dispute much or all will depend on the terms of the individual contract of employment. The employer thus cannot give an order outside the proper scope of the employment.

[47] Continuing at pp. 851-852 of the report, her Ladyship aptly said:

> [34] The duty of an employee at common law is also similar in that he is to comply with all lawful and reasonable orders given by his employer with respect to the performance of such functions within the scope of his employment. That duty is one of the fundamental obligations which are deemed to be impliedly undertaken in every contract of hiring. The duty of obedience at common law is subject to two qualifications, firstly that the employer may not order his employee to do something illegal or secondly order his employee to do anything dangerous.
>
> [35] However, it may well be that an employee is caught in the situation that he is required to obey an order and he is doubtful whether the order is legal or not. Under those circumstances, the proper course is for the employee to obey the order first and to challenge its legality in separate proceedings. This distinction is made on the basis that if the law allows the employee to disobey any order he thinks is not legal, it would be impossible for the management to maintain discipline and industrial peace. On the other hand, if the employee takes upon himself to disobey the order which he thinks to be unlawful and unreasonable two courses are open to him. He can point out his difficulties, if any, to the superior and if the latter insists on the order being carried out, he can do the work and take the matter further in proceedings against his employer or to complain to his union. If he disobeys, he must take the risk if the court finds the order to be lawful and reasonable. See the case of *Pan Global Textiles Berhad, Pulau Pinang v Ang Beng Teik* [2002] 2 MLJ 27.

[48] Absenteeism forms the basis of the third charge. And I need to quote a passage from the book by O.P. Malhotra entitled "*The Law of Industrial Disputes*", fifth edn, vol. 2, at p. 905, germane to the occasion at hand:

> No employee can claim leave of absence as a matter of right and remaining absent without leave will constitute violation of discipline. The mere fact that he had applied for leave would not be a good defence when the leave was refused by the employer in exercise of his discretion, unless it could be shown that the action taken was actuated by the desire to victimise the workman. The fact that the workman was continuously absent from work without leave on account of his detention in jail for an offence,

> will not give an immunity to the workman to remain absent without leave and the employer will be justified in discharging him from service.

[49] Then there is a speech by Lord Denning M.R. in the case of *London Transport Executive v. Clarke* [1981] ICR 355, CA, at p. 365, when his Lordship said succinctly as follows:

> I would ask this question: can an employee take off - go absent without leave - for six months and on returning say to his employer: 'You have not dismissed me. I want my job back.' If the employer refuses to take him back, can the man say: 'By your refusal you have dismissed me. Now I claim for unfair dismissal.' Surely in such a case, by taking off for six months without leave, the man has dismissed himself. If this be correct when he takes off for six months, it should also be for two months, or as here for seven weeks. The reason is because it is completely inconsistent with the continuance of his contract that he should take so long a time off. In some cases the employer will have replaced him by some other man or have got his work done by others. In other cases he may have left his work undone. But whichever it is, the employer cannot reasonably be expected to take him back. The man will himself have terminated his contract of employment.

[50] The above mentioned passage certainly applies aptly to the plaintiff appellant in relation to the third charge.

[51] Now, the plaintiff appellant has raised the issue that the first defendant respondent was the employer of the plaintiff appellant and only the employer can initiate disciplinary action against the plaintiff appellant and that such right cannot be shared jointly between the first defendant respondent and the second defendant respondent.

[52] The plaintiff appellant questioned the domestic inquiry that was conducted jointly by both the defendants respondents. But one must not lose sight of the fact that the dismissal of the plaintiff appellant was carried out by the first defendant respondent - the employer itself. My learned brother Low Hop Bing, JCA rightly said that the "power to appoint carries with it the power to revoke the appointment" and that has been done by the first defendant respondent after the domestic inquiry had found that the plaintiff appellant was guilty of all the six charges levelled against her.

[53] It seems to me that the domestic inquiry that was conducted, was meant to obtain and evaluate the evidence relating to the allegations of misconduct against the plaintiff appellant. It was also intended to give an opportunity to the plaintiff appellant to provide her explanation and defence accordingly. The domestic inquiry was more in the nature of an administrative action in order to determine whether the allegations have any basis whatsoever. In the words of Lord Denning M.R. in the case of *Norwest Holst Ltd v. Department of Trade and Others* [1978] 3 All ER 280, 292, CA, "The inspectors are not to decide rights or wrongs. They are to investigate and report."

[54] The domestic inquiry must be regarded as nothing more than an administrative exercise. It was not quasi judicial in nature and, that being the case, only a preliminary decision was made which did not decide finally the rights of the plaintiff appellant (*Wiseman And Another v. Borneman And Others* [1969] 3 All ER 275, HL; and *Union of India and Another v. WN Chadha* AIR [1993] SC 1082). In fact, the decision of the learned judge of the High Court in dismissing the plaintiff appellant's originating summons decided the fate of the plaintiff appellant and it is from that decision that we are now concerned with.

[55] It must be borne in mind that the plaintiff appellant carried out the functions for the second defendant respondent and so, it would be reasonable to say that the second defendant respondent ought to be involved in conducting the domestic inquiry. Having perused through the six charges, I can safely conclude that they are all related to the functions and responsibilities of the plaintiff appellant as the director of the complaints secretariat. In that capacity the plaintiff appellant "shall serve as the secretary to the Disciplinary Board" (the second defendant respondent) (see s. 98(2) of the Legal Profession Act 1976 (Act 166)) and that would explain the involvement of the second defendant respondent in the domestic inquiry.

[56] This was not a case where a third party has taken over the role to discipline the plaintiff appellant. By way of an administrative process, the first defendant respondent was involved in the domestic inquiry proceedings side by side with the second defendant respondent. It must be borne in mind that the second defendant respondent is a body established under the Legal

Profession Act 1976 (Act 166) and so it was only natural that the second defendant respondent was involved in the domestic inquiry.

[57] In regard to the jurisdiction of the domestic tribunal to hear the six charges against the plaintiff appellant, reference to the case of *Cheah Foong Chiew v. Lembaga Jurutera Malaysia* [1999] 3 CLJ 242 CA, should be made. There Shaik Daud, JCA speaking for this court, had this to say at p. 245 of the report:

> It is clear from this decision that as a matter of judicial policy, the normal rule is not for the court to intervene but to allow the domestic tribunal to proceed and decide the matter. It is clear that domestic tribunals can determine its own jurisdiction. It is for the applicant to raise the issue of jurisdiction before the tribunal itself which is capable of making a decision. In *Rex v. Fulham, Hammersmith and Kensington Rent Tribunal; ex p Zerek* [1951] 2 KB 1, Devlin J at p 10 said:
>
> > In my opinion, the argument on behalf of the applicant is based on a misconception of what it is that a tribunal in cases such as this is doing. When, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to their jurisdiction, the tribunal have to make up their minds whether they will act or not, and for that purpose, to arrive at some decision on whether they have jurisdiction or not.

[58] Any objection pertaining to the issue of the threshold jurisdiction during the domestic investigation by the domestic inquiry should be raised there. But unfortunately, the plaintiff appellant and her counsel chose not to attend the domestic inquiry.

[59] It cannot be denied that only the employer of the plaintiff appellant has the right to terminate her services. In this context, the first defendant respondent was the employer and has the legitimate right to terminate the plaintiff appellant's services. And this was done by way of a letter of termination of service dated 22 August 2005 pursuant to s. 98(3) of the Legal Profession Act 1976 (Act 166).

[60] I say that the failure to conduct a domestic inquiry or the carrying out of a flawed domestic inquiry would not affect the dismissal of an employee (*Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449 FC; and *Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344 FC).

Here, the domestic inquiry was conducted and proceeded as scheduled notwithstanding the absence of the plaintiff appellant and her counsel.

[61] It is ideal to mention that pursuant to the termination of her services by the first defendant respondent, the plaintiff appellant had made a representation for re-instatement under s. 20(1) of the Industrial Relations Act 1967 (Act 177). Her case has since been registered in the Industrial Court *vide* case no: 12/4-372/07. Section 20(1) of the Industrial Relations Act 1967 (Act 177) reads as follows:

> 20. Representations on dismissals.
>
> (1) Where a workman, irrespective of whether he is a member of a trade union of workmen or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.

[62] One striking feature of s. 20(1) of the Industrial Relations Act 1967 (Act 177) is that it enables an unfaily dismissed employee to seek re-instatement to his former position before the grievance can be adjudicated. It centres on dismissal without just cause or excuse. According to the case of *Holiday Inn Kuching v. Elizabeth Lee Chai Siok* [1992] 1 CLJ 141; [1992] 2 CLJ (Rep) 521 HC, a representation for re-instatement under s. 20(1) of the Industrial Relations Act 1967 (Act 177) can never be converted for compensation *in lieu* of re-instatement. According to the case of *The Borneo Post Sdn Bhd v. Margaret Wong* [2001] 8 CLJ 758 HC, the omission of the claimant to plead re-instatement did not preclude the Industrial Court from hearing and determining the case.

[63] In this appeal, we are not concerned about the issue of re-instatement under s. 20(1) of the Industrial Relations Act 1967 (Act 177). We are only concerned about the decision of the learned judge of the High Court that was delivered on 27 September 2005. But it cannot be denied that the representation to the Industrial Court by the plaintiff appellant reflects to a large extent the acceptance by the plaintiff appellant

that the first defendant respondent had terminated her services. Consequently, the question of whether the domestic inquiry and the suspension of her employment is valid or otherwise has become an academic issue and is spent.

[64] It is trite that a declaration can be used in a "wide range of circumstances" and in a "wide variety of cases in terms of subject-matter" (per Raja Azlan Shah Ag LP (as His Majesty then was) in *Dato' Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi bin Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC, at p. 31). And in a proper and suitable case, where a person would otherwise be without any remedy for the injustice done to him, the court has a wide discretionary power to intervene by way of declaration (*Barnard And Others v. National Dock Labour Board And Another* [1953] 1 All ER 1113 CA). Section 41 of the Specific Relief Act 1950 (Act 137) provides for a declaratory decree. And O. 15 r. 16 of the Rules of the High Court 1980 also makes provisions for a declaratory relief. They complement one another. Lee Hun Hoe CJ (Borneo) in *Datuk Syed Kechik bin Syed Mohamed v. Government of Malaysia & Anor* [1978] 1 LNS 44 FC said:

> The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion.

[65] The learned judge of the High Court has rightly exercised his discretion in refusing the declarations sought for in the originating summons and I am in full agreement with him.

[66] The issues that were raised and the reliefs that were prayed for by the plaintiff appellant had become academic. The declarations sought for centred on the issue of the domestic inquiry and the suspension of the employment. These issues are all spent. There is a passage from the judgment of Hashim Yeop A Sani CJ (Malaya) in *Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v. Karpal Singh Ram Singh* [1992] 1 CLJ 36; [1992] 1 CLJ (Rep) 212, that merits reproduction. There his Lordship had this to say:

> As regards the first preliminary objection it is our view that the matter had indeed, by the time the originating summons came before the learned judge, become academic. There was no living issue before the learned judge. There was no longer any lawful recipient of any benefit of any declaration sought in the originating

summons. Cases cited by the learned judge (*Sun Life Assurance Company of Canada v. Jervis* [1944] AC 111, *Loknath Padhan v Birendra Kumar* AIR [1974] SC 505 and *Mohamed Noor bin Othman & Ors v. Haji Mohamed Ismail bin Haji Ibrahim & Ors* [1988] 3 MLJ 82) constitute ample authorities for the court not to act in vain. The respondent had by then no real interest in the declarations. It will be a complete waste of judicial time if the court were to deal with the merits of the application in the originating summons solely to determine the question of costs.

[67] Likewise here, the plaintiff appellant's services had been terminated and so "there was no longer any lawful recipient of any benefit of any declaration sought in the originating summons."

[68] It is my judgment that the learned judge of the High Court did not commit any error in coming to his decision.

[69] Always supportive of my learned brother Low Hop Bing, JCA and for the reasons adumbrated above, I now make those orders as made by his Lordship.